

1 UNITED STATES DISTRICT COURT

2 DISTRICT OF NEVADA

3
4 FELTON L. MATTHEWS)

5 Plaintiff,)

6 vs.)

7 THE STATE OF NEVADA, et al.,)

8 Defendants.)

3:08-CV-00387-LRH-VPC

REPORT AND RECOMMENDATION
OF U.S. MAGISTRATE JUDGE

July 27, 2009

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10 This Report and Recommendation is made to the Honorable Larry R. Hicks, United States
11 District Judge. The action was referred to the undersigned Magistrate Judge pursuant to 28
12 U.S.C. § 636(b)(1)(B) and LR IB 1-4. Before the court is plaintiff's motion for preliminary
13 injunction, or in the alternative, permanent injunction (#21). Plaintiff also filed a motion for
14 leave to amend/supplement the motion for preliminary injunction (#30). Defendants opposed (#s
15 41 & 46¹), and plaintiff replied (#54). For the reasons stated below, the court recommends that
16 plaintiff's motion for preliminary injunction (#s 21 & 30) be denied.

17 **I. HISTORY & PROCEDURAL BACKGROUND**

18 Plaintiff Felton Matthews ("plaintiff") is currently incarcerated by the Nevada Department
19 of Corrections ("NDOC") at Ely State Prison ("ESP") (#28). Plaintiff brings this action pursuant
20 to 42 U.S.C. § 1983, alleging that defendant violated his First, Eighth and Fourteenth Amendment
21 rights while he was incarcerated at ESP and held at the Clark County Detention Center
22 ("CCDC"). *Id.* Plaintiff names as a defendants the Legislature of the State of Nevada; the State
23 of Nevada; Jim Gibbons, Governor of Nevada²; Catherine Cortez Masto, Attorney General for

24
25 ¹Docket #41 is the response of defendant Legislature of the State of Nevada. Docket #46 is
26 the response of defendants Jim Gibbons, Catherine Cortez Masto, Howard Skolnik, and Adam
Endel.

27 ²Following all briefing on the instant motion, the parties agreed to voluntarily dismiss this
28 action with respect to defendant Legislature of the State of Nevada and Governor Jim Gibbons (#s
75, 76). Defendant Legislature of the State of Nevada's motion to dismiss (#43) was denied as moot

1 the State of Nevada; “CCDC/unknown,” a “jailhouse officer/Admin” employed at the Clark
 2 County Detention Center;³ Bernard Curtis, chief of the Nevada Department of Parole and
 3 Probation; Kechia English, Investigator for Child Protective Services; Howard Skolnik, Director
 4 of NDOC; Adam Endel, Associate Warden of Programs at ESP; and Joyce Thomson, caseworker
 5 at ESP.⁴ *Id.*

6 Plaintiff’s complaint includes five counts of alleged constitutional violations, as follows
 7 (#28):

8 Count I: Plaintiff alleges that defendants violated his Fourteenth Amendment right to due
 9 process and equal protection, and to protection from *ex post facto* implementation of law. Plaintiff
 10 claims that by passing “new laws that increase [his] punishment and tier rating as a convicted sex
 11 offender where they give lesser tier ratings to serial and repeat offenders,” defendants have
 12 violated his Fourteenth Amendment rights. *Id.* p. 5. Plaintiff contends that Assembly Bill 579 and
 13 Senate Bill 471 apply *ex post facto* penalties on him and others similarly situated, by increasing
 14 his sentence and putting him at risk of attack. *Id.* p. 6-10.

15 Count II: Plaintiff alleges that defendants violated his Fourteenth Amendment rights to

16 _____
 17 (#88). Further, the remaining defendants’ motion to dismiss (#47) was denied as moot with respect
 18 to defendant Governor Jim Gibbons (#96, n.2).

19 ³On June 5, 2009, plaintiff moved to substitute Douglas C. Gillespie, Clark County Sheriff
 20 for “CCDC/unknown” (#87).

21 ⁴Plaintiff filed a “motion to dismiss defendants K. English &... Bernard Curtis without
 22 prejudice w/request to file Magistrate’s order of facts, findings, and conclusions for 09-cv-N-160-
 23 BES (VPC)” (#77). Defendants filed a response stating that they had no opposition to dismissing
 24 these two defendants; however, a dismissal was not necessary because defendants English and Curtis
 25 were never served in this case (#80). Plaintiff then sent a letter to the Clerk requesting both that
 26 defendants English and Curtis be dismissed and that plaintiff be granted an extension of time to serve
 27 these defendants (#83). As the court was unclear of plaintiff’s intentions, on May 14, 2009, it ordered
 28 plaintiff to file a notice with the court by Friday May 29, 2009, and choose whether he wished to
 proceed in this case against defendants English and Curtis, or whether he wished to dismiss these
 defendants from this action (#84). The court stated that if plaintiff failed to make his intentions clear,
 “the court will proceed with service of process on Kechia English and Bernard Curtis and will strike
 plaintiff’s motion to dismiss.” *Id.* On June 15, 2009, plaintiff requested the court issued him a
 summons and a copy of the complaint to serve upon defendants English and Curtis (#90). Defendant
 English was served on July 10, 2009 (#94), and defendant Curtis was served on July 16, 2008.

1 equal protection and due process by failing to remove “libel and slander” from his file, in
 2 violation of the policy of NDOC administrative regulations to “correct data submitted by third
 3 parties.” *Id.* p. 11. Plaintiff also claims that Nev. Rev. Stat. 213.30 creates *ex post facto* penalties
 4 and affects his rights under his plea agreement. *Id.* p. 12.

5 Count III: Plaintiff claims that defendants violated his Eighth Amendment right against
 6 cruel and unusual punishment when Dr. Pagliani “deliberately committed malpractice,” and when
 7 parole and probation and Dr. Pagliani failed to “address or correct” “libel and slander,” which is
 8 included in his file based on statements of third parties. *Id.* p. 13.

9 Count IV: Plaintiff alleges that defendants violated his Eighth Amendment right against
 10 cruel and unusual punishment. Again, plaintiff references false statements included in his file, and
 11 states that he is “entitled to protection against cruel and unusual punishment in the form of
 12 harrassment (sic) and libel and slander by CCDC and NDOC employees.” *Id.* p. 14. Plaintiff
 13 states that he has been held in “illegal and excessive” administrative segregation because
 14 defendants Endel and Skolnik will not remove the information from his file. *Id.* p. 15.

15 Count V: Plaintiff claims that defendants have violated his First Amendment right to
 16 access the courts because “the exhibits A-I in a memorandum to Pershing County Court did not
 17 reach and [he] was not served a motion for abeyance which delayed justice on a state level which
 18 could have given [him] relief on at least a records correction.” *Id.* p. 16.

19 The court notes that the plaintiff is proceeding *pro se*. “In civil cases where the plaintiff
 20 appears *pro se*, the court must construe the pleadings liberally and must afford plaintiff the benefit
 21 of any doubt.” *Karim-Panahi v. Los Angeles Police Dep’t*, 839 F.2d 621, 623 (9th Cir. 1988); *see*
 22 *also Haines v. Kerner*, 404 U.S. 519, 520-21 (1972).

23 II. DISCUSSION & ANALYSIS

24 A. Discussion

25 1. Preliminary Injunction Standard

26 A preliminary injunction is an “extraordinary and drastic remedy” that is never awarded
 27 as of right. *Munaf v. Geren*, --- U.S. ----, ----, 128 S.Ct. 2207, 2219, 171 L.Ed.2d 1 (2008)
 28 (citations and quotation omitted). Instead, the instant motion requires the court to “balance the

1 competing claims of injury and . . . the effect of the granting or withholding of the requested
 2 relief.” *Winter v. Natural Res. Def. Council*, --- U.S. ----, ----, 129 S.Ct. 365, 376 (2008)
 3 (quoting *Amoco Prod. Co. v. Gambell*, 480 U.S. 531, 542, 107 S.Ct. 1396, 94 L.Ed.2d 542
 4 (1987)). A plaintiff seeking a preliminary injunction must establish the following: (1) a
 5 likelihood of success on the merits, (2) a likelihood of irreparable injury to the plaintiff if
 6 injunctive relief is not granted, (3) a balance of hardships favoring the plaintiff, and (4)
 7 advancement of the public interest. *Id.* at 374 (citations omitted).⁵

8 The Prison Litigation Reform Act (PLRA) imposes certain guidelines on the prospective
 9 relief to be granted to an inmate litigant challenging prison conditions:

10 Preliminary injunctive relief must be narrowly drawn, extend no further than
 11 necessary to correct the harm the court finds requires preliminary relief, and be the
 12 least intrusive means necessary to correct that harm. The court shall give
 13 substantial weight to any adverse impact on public safety or the operation of a
 14 criminal justice system caused by the preliminary relief and shall respect the
 15 principles of comity set out in paragraph (1)(B) in tailoring any preliminary relief.

16 18 U.S.C. § 3626(a)(2). “Section 3626(a) therefore operates simultaneously to restrict the equity
 17 jurisdiction of federal courts and to protect the bargaining power of prison administrators – no
 18 longer may courts grant or approve relief that binds prison administrators to do more than the
 19 constitutional minimum.” *Gilmore v. People of the State of Cal.*, 220 F.3d 987, 999 (9th Cir.
 20 2000).

18 **B. Analysis**

19 Plaintiff seeks an “injunction against SB471, 579, and against all Nevada Special Victim
 20 Units and Child Protective Services and Nevada PNP” (#21, p. 1). Specifically, plaintiff moves
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22 ⁵ Before *Winter*, the courts in this circuit occasionally applied an alternative, “sliding-scale”
 23 test for issuing a preliminary injunction which allowed the movant to offset the weakness of a
 24 showing on one factor with the strength of another. See *Beardslee v. Woodford*, 395 F.3d 1064, 1067
 25 (9th Cir. 2005). In *Winter*, the Supreme Court did not directly address the viability of the balancing
 26 approach. *Winter*, 129 S.Ct. at 392 (Ginsburg, J., dissenting) (“[C]ourts have evaluated claims for
 27 equitable relief on a ‘sliding scale,’ sometimes awarding relief based on a lower likelihood of harm
 28 when the likelihood of success is very high ... This Court has never rejected that formulation, and
 I do not believe it does so today.”). In any event, the court will consider prospective relief based on
 all four of the traditional preliminary injunction requirements. Applying the balancing approach here
 would not lead to a different result, as Plaintiff has not made a strong showing on any single factor
 for injunctive relief. See *infra*.

for five forms of injunctive relief with regard to Assembly Bill 579 and Senate Bill 471 and the Nevada Department of Parole and Probation, as follows:

- 1) Permanent Injunction on retro-active implementation of [Amie] Zyla Act from the time it's implemented.
- 2) Increase penalties for attacks on child sex offenders to support adequate equal protection of that of hate crime.
- 3) Permanent injunction on the current use of [child protective services] and D.A./A.G. prosecution and investigation techniques. If it starts in family court it goes clean to trial, the accused keeps their bonds (sic)....
- 4) Strike [the Department of Parole and Probation's] policy on [pre-sentence investigation report] and I-file correction. Third parties have no right to lie on inmates or defendants. It's clearly unconstitutional. Order mass authenticated [pre-sentence investigation report]/criminal record corrections.
- 5) Due process on sex offender registration.

(#21, p. 5-6) (emphasis in original).

1. Likelihood of Success on the Merits

To obtain a preliminary injunction, plaintiff must offer evidence that there is a likelihood he will succeed on the merits of his claim. *Johnson*, 72 F.3d at 1430. "Likelihood of success on the merits" has been described as a "reasonable probability" of success. *King v. Saddleback Junior College Dist.*, 425 F.2d 426, 428-29 n.2 (9th Cir. 1970).

Plaintiff's motion for preliminary injunction appears to apply to counts I-IV of his complaint.⁶ Plaintiff's first request, an order enjoining the enforcement of AR 579 and SB 471, applies only to the State of Nevada and the Legislature of the State of Nevada. However, the parties agreed to voluntarily dismiss this action with prejudice with respect to defendant Legislature of the State of Nevada and Governor Jim Gibbons (#s 75 & 76). Therefore, plaintiff's motion for preliminary injunction is moot as to relief against these defendants. Further, in a separate action, the District Court entered a permanent injunction against AB 579 and SB 471 (Case 2:08-cv-00822-JCM-PAL, #77). As a permanent injunction is already in place, the court need not enter another injunction, and plaintiff's request is moot.

Plaintiff's remaining requests for injunctive relief (2-5) do not appear to apply directly to

⁶Plaintiff also filed a second motion for preliminary injunction regarding his mail tampering allegations in count V of his complaint (*See* #33).

1 plaintiff. Plaintiff is currently incarcerated; therefore, any policies employed by state agencies
2 who are involved in the prosecution of sex offenders are not applicable to plaintiff. Additionally,
3 even assuming the state was violating convicted sex offenders' due process rights through certain
4 post-release registration requirements, as plaintiff is incarcerated, none of these registration
5 requirements applies to him at this time. Therefore, plaintiff does not have standing to bring such
6 claims. If plaintiff is challenging the methods used by the named agencies during plaintiff's
7 criminal trial or the evidence introduced at his criminal trial, plaintiff must bring such a challenge
8 through a petition for a writ of habeas corpus. Therefore, plaintiff has not demonstrated a
9 likelihood of success on the merits.

10 **2. Irreparable Injury**

11 To obtain a preliminary injunction, plaintiff must offer evidence that he will be irreparably
12 injured without the injunction. *Johnson*, 72 F.3d at 1430. "Courts generally do look at the
13 immediacy of the threatened injury in determining whether to grant preliminary injunctions."
14 *Privitera v. California Bd. Of Medical Quality Assurance*, 926 F.2d 890, 897 (9th Cir. 1991)
15 *citing Caribbean Marine*, 844 F.2d at 674 ("a plaintiff must *demonstrate* immediate threatened
16 injury as a prerequisite to preliminary injunctive relief").

17 Plaintiff does not directly specify what irreparable injury he will immediately suffer
18 without an injunction. He makes broad statements alleging that Child Protective Services violate
19 the rights of sex offenders during investigation, prosecution, and sentencing of offenses. Again,
20 plaintiff has been convicted and is incarcerated. Plaintiff does not have standing to challenge the
21 methods Child Protective Services uses to investigate the alleged crimes of other people. Plaintiff
22 cannot challenge his conviction through a section 1983 civil rights action. *See Heck v. Humphrey*,
23 512 U.S. 477 (1994). Plaintiff has not demonstrated that he will suffer irreparable injury.

24 **3. Balance of Hardships and Public Interest**

25 Because the court concludes that plaintiff failed to demonstrate a likelihood of success on
26 the merits and irreparable injury, the court has not addressed the balance of hardships or public
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28

1 interest elements.⁷

2 III. CONCLUSION

3 Based on the foregoing and for good cause appearing, the court concludes that plaintiff
4 has failed to meet the standard for issuance of a preliminary injunction. As such, the court
5 respectfully recommends that plaintiff's motion for preliminary injunction (#21) and motion
6 for leave to amend the motion for preliminary injunction (#30) be **DENIED**.

7 The parties are advised:

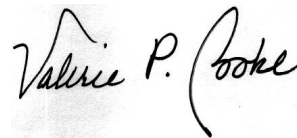
8 1. Pursuant to 28 U.S.C. § 636(b)(1)(c) and Rule IB 3-2 of the Local Rules of
9 Practice, the parties may file specific written objections to this report and recommendation
10 within ten days of receipt. These objections should be entitled "Objections to Magistrate
11 Judge's Report and Recommendation" and should be accompanied by points and authorities
12 for consideration by the District Court.

13 2. This report and recommendation is not an appealable order and any notice of
14 appeal pursuant to Fed. R. App. P. 4(a)(1) should not be filed until entry of the District
15 Court's judgment.

16 IV. RECOMMENDATION

17 **IT IS THEREFORE RECOMMENDED** that plaintiff's motion for preliminary
18 injunction (#21) and motion for leave to amend the motion for preliminary injunction (#30) be
19 **DENIED**.

20 **DATED:** July 27, 2009.



21
22 **UNITED STATES MAGISTRATE JUDGE**

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25 ⁷Plaintiff also filed a "motion for leave to amend/supplement motion for preliminary
26 injunction: FRCP Rule 15" (#30). As an initial matter, Rule 15 applies only to the amendment of
27 pleadings; therefore, it is inapplicable in this case. Further, plaintiff has introduced no arguments that
28 were not presented in his initial motion for preliminary injunction (#21). Plaintiff brings his amended
motion against only the State of Nevada and the Nevada Legislature (#30). As previously discussed,
the parties agreed to voluntarily dismiss these defendants (#s 75 & 76). Therefore, plaintiff's motion
for leave to amend and amended motion for preliminary injunction (#30) is **denied**.